No. 3027.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

FRANK E. WHELPLEY,
Appellant,

vs.

ANDREW GROSVOLD,
Appellee.

PETITION FOR REHEARING

ROBERT W. HARRISON,
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To the Honorable Justices of the United States Corcuit Court of Appeals for the Ninth Circuit:

On behalf of appellant we respectfully ask for a rehearing in the above entitled matter. We do so especially because from the opinion rendered by this Court we believe certain matters presented in the appellant's briefs, especially in his supplemental brief, have escaped the Court's attention. We cannot otherwise account for the fact that certain acts of Congress and certain settled principles of law have apparently not been accorded that consideration to which, with due deference to the Court, we submit they are entitled.

THE PRESIDENT CANNOT OVERRIDE AN ACT OF CONGRESS DEALING WITH THE PUBLIC DOMAIN.

The opinion of the Court assumes that the President has authority over the public domain of the United States superior to that of Congress, and that notwithstanding Congress has been vested with full and exclusive control over the public domain by the Constitution and has enacted that one official shall do or perform certain acts with respect thereto, that it is still within the power of the President to set at naught the will of Congress and prescribe that some other official shall perform those acts or exercise such power. This is certainly a startling doctrine. If the President has this power in this instance he has it in all instances and it becomes an idle act for Congress to vest any jurisdiction of any matter in a particular officer appointed by the President. The various departments have been created by Congress and not by the President—their powers and duties are prescribed by and derived from acts of Congress and they could tomorrow be abolished by Congress. The President cannot create them nor confer powers upon them not authorized by the Constitution or Congress.

It is a matter of common knowledge, and we need but mention it to the Court, that there is now pending before Congress a bill, known as the Overman Bill, the object of which is to confer upon the President this very power which apparently this Court holds the President to have without the necessity of any Congressional action.

But it is said in the opinion that "the power to make the leases in question, if it exists, is executive power" and that in the absence of inconsistent statutory provision, the President has authority to assign to the heads of the departments powers which are vested in the executive. If the power to lease was by the act of Congress *vested in the President* this would undoubtedly be true, but the power to make leases of the character here in question was by the act of Congress vested *not in the President but in the Secretary of the Treasury* and could, we submit, be lawfully exercised in the name of the United States only by or under that particular official, and not through some other department, or the executive head thereof, without the sanction of Congress.

Can it be said that it was in the power of the President to transfer to the Department of Commerce and Labor any and all of the jurisdiction exercised by any of the other departments regardless of the act of Congress designating the particular business and jurisdiction that should be transferred? Will it be said that he has that power because all the powers exercised by any of the departments are executive power? And if so what was the reason or necessity for the Act of Congress prescribing what branches or business should be transferred to or exercised by the Department of Commerce and Labor? Is it claimed that Congress cannot control the respective duties that shall be performed by the departments which it creates? Is it claimed that the President could without authority from Congress transfer all postal matters to the Sec-

retary of the Interior, or transfer all land matters to the Secretary of the Navy? These must be the positions assumed if the opinion in this case stands.

But the opinion of the Court in that respect is in direct opposition to every adjudicated case which we have found and to those cases cited in our Supplemental Brief which apparently the Court did not consider when rendering its opinion. We respectfully direct the Court's attention to the following cases:

United States v. *Gratiot,* 14 Pet. 537;
United States v. *Fitzgerald,* 15 Pet. 407;
Knote v. *United States,* 10 Ct. Cl. 397;
Flores v. *United States,* 18 Ct. Cl. 352;
United States v. *Nicoll,* 1 Paine, 646;
United States v. *Hare,* Fed. Cas. No. 15303;
Kendall v. *United States,* 12 Pet. 524;
The Floyd Acceptances, 7 Wall. 666;
Knight v. *U. S. Land Assn.,* 142 U. S. 161, 177;
Johanson v. *Washington,* 190 U. S. 179, 185;
Fisher v. *United States,* 37 App. D. C. 436;
Utah Power & Light Co. v. *United States,* 243 U. S. 389, 404.

The Constitution, Article IV, Section 3, Paragraph 2, expressly provides that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Control over the public domain is thereby vested in Congress and not in the President. When Congress in the exercise of such power of control has empowered one department to do certain acts with respect to the public domain and has expressly declared the particular official in that department by or under whom such acts shall be done

on behalf of the government, the President may not override the will of Congress and empower another official to act in the matter. If he could do so there is nothing to the constitutional provision, and the President would be exercising that control which the Constitution has vested solely in Congress.

Nor does the fact that the Secretary of the Treasury recommended the transfer add any force to the act of the President. It does not lie within the power of the head of one department to transfer or delegate to another department the powers and duties which Congress has said shall be exercised or performed by him.

In *Johanson* v. *Washington, supra,* at page 185, it is said:

> "Further, it must be remembered that the general supervision of the affairs of the Land Department is now vested in the Secretary of the Interior, and that unless Congress clearly designates some other officer to act in respect to such matters it will be assumed that he is the officer to represent the Government."

In *Utah Power & Light Co.* v. *United States, supra,* at page 404, it is said:

> "Not only does the Constitution (Art. IV, Sec. 3, cl. 2) commit to Congress the power 'to dispose of and make all needful rules and regulations respecting' the lands of the United States, but the settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired."

Even when the Supreme Court by a divided court held that the President might make a reservation of oil lands the majority rested their decision upon a series of departmental rulings lasting over a number of years. But even in that case, after reviewing the effect of certain previous decisions, the opinion of the majority of the court states:

> *"Nor do these decisions mean that the Executive can by his course of action create a power."*
>
> *United States* v. *Midwest Oil Co.,* 236 U. S. 459, at page 474.

And on the same page in that opinion it is said:

> "For it must be borne in mind that Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein. Congress 'may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale.' *Camfield* v. *United States,* 167 U. S. 524; *Light* v. *United States,* 220 U. S. 536. Like any other owner it may provide when, how and to whom its land can be sold."

Apparently at an early day in our history it was suggested that Congress could not impose a duty upon an officer of the executive department or if it had done so he might be controlled in the exercise thereof by the President. This led to an action in *mandamus* in which the Supreme Court announced these views:

> "The executive power is vested in a president; and so far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by

> the constitution through the impeaching power. But it by no means follows, that every officer in every branch of that department is under the exclusive direction of the president. Such a principle, we apprehend, is not, and certainly cannot be claimed by the president. There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the president. But it would be an alarming doctrine that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the president. And this is emphatically the case, where the duty enjoined is of a mere ministerial character."
>
> *Kendall* v. *United States,* 12 Pet. 524, at page 610.

If this be true when the duty is ministerial, must it not necessarily be true when the duty is a discretionary one? For in that case Congress has chosen the officers in whom it has vested the discretion and it is not for the President to designate another official to exercise such discretion.

And in a later case it was said by that Court:

> "Whenever negotiable paper is found in the market purporting to bind the government, it must necessarily be by the signature of an officer of the government, and the purchaser of such paper, whether the first holder or another, must, at his peril, see that the officer had authority to bind the government.
>
> "When this inquiry arises, where are we to look for the authority of the officer?

> "The answer, which at once suggests itself to one familiar with the structure of our government, in which all power is delegated, and is defined by law, constitutional or statutory, is, that to one or both of these sources we must resort in every instance. We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority. And while some of these, as the President, the Legislature, and the Judiciary, exercise powers in some sense left to the more general definitions necessarily incident to fundamental law found in the Constitution, the larger portion of them are the creation of statutory law, with duties and powers prescribed and limited by that law. It would seem reasonable, then, that on the question of the authority of the Secretary of War to accept bills of exchange, we must look mainly to the acts of Congress."
>
> The Floyd Acceptances, 7 Wall. 666, at page 676.

We respectfully submit on this point that Congress, having delegated to and vested in the Secretary of the Treasury the power to lease lands in certain cases, that power cannot without the sanction of Congress be exercised through any other Department regardless of whether or not the President ordered a transfer of the business to such other department. That Congress has never expressly, or by implication, in any act authorized or recognized the power of leasing lands, of the character here involved, in any other than the Secretary of the Treasury is evident. In none of the acts cited in the briefs or in the opinion of the Court has it done so, nor did it ever transfer,

or authorize the President to transfer, such power from the Secretary of the Treasury or to the Secretary of Commerce.

THE POWER TO LEASE BY WHATEVER OFFICIAL EXERCISED COULD ONLY HAVE BEEN EXERCISED WITH RESPECT TO *UNOCCUPIED LANDS.*

The Court in its opinion has entirely overlooked one of our main contentions—namely, that the power to lease, whether exercised by the Secretary of the Treasury or by the Secretary of Commerce, could only be exercised with respect to *unoccupied lands.* That is a limitation of the power expressly stated in Section 1 of Chapter 182 of the Act of March 3, 1879 (20 Stats. 383; R. S. 3749), which conferred upon the Secretary of the Treasury authority

> "to lease, at his discretion for a period not exceeding five years, *such unoccupied and unproductive property* of the United States *under his control,* for the leasing of which there is no authority under existing law, * * *"

And that even the Attorney General of the United States regarded it as an essential requisite to the exercise of the power that the land should be unoccupied before it could be leased is evidenced in the two opinions of that official which we cited and in each of which it was held that the leases could not be made because the lands were occupied.

> 20 Op. Atty. Genl. 537;
> 21 Op. Atty. Genl. 476.

Upon this point we respectfully submit that the record in this case conclusively shows that this island was occupied by the appellant at the time of this lease and at all the times in question, and that therefore it was not within the power of any official under any act of Congress to lease this island. And that in the absence of Congressional authority no official can lease is held in the following cases:

Knote v. *United States,* 10 Ct. Cl. 397;
Flores v. *United States,* 18 Ct. Cl. 352;
United States v. *Hare,* Fed. Cas. No. 15303;
4 Op. Atty. Genl. 480.

IN AN ACTION TO ENJOIN TRESPASS POSSESSION *MUST BE ALLEGED AND PROVED.*

Regardless of whether the distinctions between actions at law and suits in equity have been abolished it is still necessary that the complaint, declaration or bill must state sufficient facts to justify the relief prayed for and that the proof must accord therewith. It is an essential in any action based upon a trespass, whether for damages or for an injunction, that possession be shown in plaintiff and an interference therewith by defendant. We submit that this was not sufficiently alleged in the pleadings nor proved at the trial.

THE JUDGMENT MUST BE SUPPORTED BY THE FINDINGS.

Against a direct attack by appeal no judgment can stand unless it is supported by sufficient findings of fact. We asserted in our Supplemental Brief and

we here again respectfully assert that in the findings of the lower Court there is not to be found a statement or a bit of evidence of the fact, or to the effect, that the plaintiff was ever at any time in possession of this island. Such a finding is essential to support a judgment of this character enjoining defendant from trespassing upon land claimed by plaintiff. We have fully presented in our brief our views upon this point and we urge upon the Court a reconsideration thereof. We do not believe that outside of the present opinion of this Court there can be found an authority for supporting a judgment of this character upon such findings.

In conclusion, we respectfully ask that in view of the apparent unjust position in which appellant has been placed by the action of the government officials as evidenced by the report of the Deputy Commissioner quoted in our Supplemental Brief, that this

I hereby certify that the foregoing Petition for Rehearing is, in my judgment, well founded and that the same is not interposed for delay.

ROBERT W. HARRISON,
Of Counsel for Appellant.

a date as will suit the convenience of this Court.

Respectfully submitted,

ROBERT W. HARRISON,
Of Counsel for Appellant.